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IN THE

Supreme Court of the United States

October Term, 1964

No. 431

THOMAS D. GEORGE, JOHN C. WINTHROP AND CHARLES F. FINK,

Petitioners,

v.

DOUGLAS AIRCRAFT CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILBUR E. DOW, JR.,
Counsel for Petitioners,
80 Broad Street,
New York, New York 10004.

Of Counsel:
W. SHELBY COATES, JR.,
DOW & STONEBRIDGE,
80 Broad Street,
New York, New York 10004.

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Petitioners,

v.

DOUGLAS AIRCRAFT CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Thomas D. George, John C. Winthrop, and Charles F. Fink, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 28, 1964.

Opinions Below

The memorandum opinion of the District Court for the Southern District of New York (R. 3a-8a) [1] dated July 20, 1963 has not been officially or unofficially reported. The opinion of the Circuit Court of Appeals for the Second

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[1] "R." and "Op." followed by page numbers indicate citations to the certified record filed herewith and the opinion of the United States Court of Appeals herein (as reprinted in the Appendix to this Petition), respectively.

Circuit, printed in the Appendix hereto at pages 1a to 12a, is officially reported at 332 F. 2d 73 and unofficially reported on page 1 of the August 5, 1964 issue of the New York Law Journal.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 50a, Op. 13a) was entered on April 28, 1964. The timely petition of appellants below for rehearing (R. 52a-59a) was denied on May 27, 1964 (R. 60a, 62a, 64a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether a United States Circuit Court of Appeals in "diversity of citizenship" litigation is empowered to construe State statutes of limitations in a manner conflicting with State court decisions construing the same statutes of limitations with the result that the Federal Court of Appeals' construction time-bars the warranty action, premised on "strict liability" concepts, of a crash injured flight crew against the aircraft's manufacturer.

Statutes Involved

NEW YORK CIVIL PRACTICE ACT —
ARTICLE 2 (LIMITATIONS OF TIME)

"11. Mode of computing periods of limitation.

The periods of limitation prescribed by this article, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or a de-

fendant in the particular action or special proceeding. * * * " [Effective Sept. 1, 1941; counterpart section found in new *Civil Practice Law and Rules* §203(a) and (f), effective Sept. 1, 1963].

* * * *

"13. Limitation where cause of action arises outside of state.

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *" [Effective Sept. 1, 1929; counterpart section found in new *Civil Practice Law and Rules* §202, effective Sept. 1, 1963].

FLORIDA STATUTES

"95.11 Limitations upon actions other than real actions.

Actions other than those for the recovery of real property can only be commenced as follows:

* * * *

(3) Within five years.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal.

(4) Within four years.—Any action for relief not specifically provided for in this chapter.

(5) Within three years.—

* * * *

(6) And an action upon a contract, obligation or liability not founded upon an instrument of writing, including an action for goods, wares and merchandise sold and delivered, and on store accounts."

Statement

Petitioners, members of the crew of a DC-7C passenger aircraft sold by Douglas Aircraft Co. to Braniff Airways in 1957, were injured when the airplane crashed in Florida in the early morning of March 25, 1958, as the result of engine failure shortly after taking off from Miami on a flight to South America (Op. 1a). They brought their joint action against Douglas in the United States District Court for the Southern District of New York on March 25, 1963, predicating federal jurisdiction on diversity of citizenship and amounts. (See 28 U. S. C. §1332).

Petitioners' complaint alleged that Douglas had "impliedly and expressly represented and warranted" that the aircraft sold by it to Braniff and the Curtiss-Wright engines installed therein "were of good and merchantable quality, free from defects, and fit for the purposes of commercial carriage for hire for which said aircraft and model engines were intended" (Op. 1a-2a). Douglas moved for summary judgment "on the ground that the statute of limitations has expired"—more particularly the limitations statute of California, where the airplane was made and delivered, or of Florida, one or the other of which was considered to be made applicable by New York's "borrowing" statute, Civil Practice Act §13 (Op. 2a). Petitioners denied that their joint action was barred under the Florida statute of limitations, which they considered to be the pertinent one (Op. 2a). The District Judge granted summary judgment in favor of Douglas (Op. 2a). The Court of Appeals affirmed the judgment of the District Court on reasoning substantially differing from that invoked by Douglas or adopted by the District Judge.[2]

[2] Compare the opinion (R. 3a-8a) of the Honorable Irving Ben Cooper, U. S. D. J., with that of the Honorable Henry J. Friendly, U. S. C. J. (Op. 1a-12a).

REASONS FOR GRANTING WRIT

I.

The Federal Court of Appeals has construed the New York "borrowing" statute in a novel manner conflicting with applicable New York Law.

At the time petitioners commenced their joint action in the District Court in New York,[3] they were citizens of Texas. Douglas Aircraft Company was incorporated in Delaware and Douglas had its principal place of business in California (Op. 1a). New York's "borrowing" statute, as it stood on March 25, 1963 (Civil Practice Act § 13), forbade the bringing of an action by a non-resident to enforce a cause of action "arising" outside New York "after the expiration of the time limited by the laws * * * of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *" (Op. 3a). Petitioners' injuries were caused in Florida where the aircraft crashed on March 25, 1958 as a result of an engine failure (Op. 1a).

Apart from the "borrowing" statute, petitioners' joint action was timely even if Douglas was continuously subject to suit in New York (Op. 3a). In applying the "borrowing" statute, however, the Court of Appeals predicted "that New York would hold that plaintiffs' cause of action here 'arose' in California, whose one year statute would be a bar'" (Op. 10a). The Court of Appeals conceded, nevertheless, that they could not "be wholly confident as to the accuracy of that prediction" (Op. 10a).

Petitioners submit that the existing New York law clearly pointed, and does now point with recent emphasis,

[3] Several other actions arising out of the same crash were then and are now pending in that court. See, for instance, *Public Admin. of New York County* v. *Curtiss-Wright Corp.*, 224 F. Supp. 230 (D. C. S. D. N. Y. 1963).

to Florida, rather than California, as the state where their "cause of action arose." As stated in *Ripley v. International Railways of Cent. America*, 8 A. D. 2d 310, 188 N. Y. S. 2d 62, 76 (1st Dep't 1959), aff'd 8 N. Y. 2d 430, 171 N. E. 2d 443 (1960):

> "Under Section 11 of the Civil Practice Act[1] the applicable 'periods of limitation * * * must be computed from the time of the accruing of the right to relief by action.' This means 'the time when the plaintiff first became enabled to maintain the particular action in question.' Cary v. Koerner, 200 N. Y. 253, 259, 93 N. E. 979, 982."

It is uncontested, on Douglas' motion for summary judgment herein, that petitioners, the flight crew, were not and could not have been aware of the defects in the engine that failed until at least the day of the crash, March 25, 1958 (R. 20a, 24a).

Petitioners concede that the "general rule" in New York has been stated to be "that a cause of action for a breach of warranty accrues at the time of sale and not afterward." *Citizens Util. Co.* v. *American Locomotive Co.*, 11 N. Y. 2d 409, 416, 184 N. E. 2d 171 (1962). In a more recent decision, however, New York's Court of Appeals, in a case involving an action brought for wrongful death of an airplane passenger against the manufacturer of the crashed aircraft (and other defendants), stated that "[a] breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises, but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 436, 191 N. E. 2d 81 (1963). In adopting a new "strict liability"

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[1] Civil Practice Act § 11, quoted at pages 2-3 of this Petition, governs all of Article 2 (Limitations of Time) of the Civil Practice Act, "* * * except as otherwise specially prescribed therein. * * *"

rule for New York, the Court of Appeals, at 12 N. Y. 2d 437, stated:

> "Very recently the Supreme Court of California (Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897 [1963], supra) in a unanimous opinion imposed 'strict tort liability' (surely a more accurate phrase) regardless of privity on a manufacturer in a case where a power tool threw a piece of wood at a user who was not the purchaser. The California court said that the *purpose of such a holding is to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves* and that implicit in putting such articles on the market are representations that they will safely do the job for which they were built. However, for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." [Emphasis added.]

In view of the policy italicized above and adopted by New York, petitioners submit that the New York Court of Appeals, in a "strict liability" situation such as we have herein, would hold that the ultimate user's "cause of action"—for the purpose of applying the appropriate statute of limitations and for other purposes as well—arose at the time of injury and not before. This approach has been very recently applied in one of New York's appellate courts in *Singer v. Walker*, 250 N. Y. S. 2d 216 (1st Dep't 1964) (although defective hammer was sold in New York, "tort cause of action" considered to arise in Connecticut where ultimate user harmed). Such an approach would comport with the recently expressed view that "Statutes of limitations are construed, where possible, so as to give the parties their day in court and should not be defeated by overstrict

construction * * *." *Hotaling* v. *General Elec. Co.*, 16 A. D. 2d 339, 228 N. Y. S. 2d 376, 379 (3rd Dep't 1962), aff'd 12 N. Y. 2d 316, 189 N. E. 2d 698 (1963).

The United States Supreme Court has, in the past, granted certiorari in a diversity of citizenship case upon a petition which set up that the United States Court of Appeals for the Sixth Circuit "* * * had erroneously applied the Ohio rule of limitations and laches, all questions of public importance concerning the interrelation of state and federal courts." *West* v. *American Teleph. & Teleg. Co.*, 311 U. S. 223, 235 (1940). The Court of Appeals herein has also departed from well-founded *Erie*[2] principles. Petitioners respectfully pray, therefore, that the uncertainty in the law that has resulted from the Court of Appeals' unique construction of New York's "borrowing" statute be reviewed and the overturned federal-state relationship be set aright.

II.

The Federal Court of Appeals failed to apply controlling substantive and procedural decisions of the Supreme Court of Florida.

As the United States Circuit Court of Appeals for the Second Circuit was not "wholly confident as to the accuracy" of its prediction that the New York Court of Appeals "would hold that plaintiffs' cause of action here 'arose' in California" (Op. 10a), the Court of Appeals also considered the consequences if petitioners' "cause of action" were deemed, for the purposes of New York's "borrowing" statute, to have arisen in Florida. It is petitioners' contention that the "borrowing" statute entitles them to prevail in that it would adopt *Fla. Stat.* 95.11(3), permitting an action to be brought "within five

[2] *Erie R. Co.* v. *Tompkins*, 304 U. S. 78 (1938).

years" when that action is "upon any contract, obligation or liability founded upon an instrument of writing not under seal" (Op. 10a).

Petitioners, as employees of Braniff, found their joint action on the "Purchase Agreement" (R. 29a-32a), entered into by Douglas and Braniff on February 2, 1955, under which Douglas contracted to manufacture and sell to Braniff seven DC-7C aircraft, including the one which crashed on March 25, 1958. Petitioners agree with the Court of Appeals that an action by Braniff[6] against Douglas under the purchase contract would come within *Fla. Stat.* § 95.11(3) "even if Braniff relied on provisions that were implied rather than express. *McGill* v. *Cockrell*, 88 Fla. 54, 101 So. 196, 201 (1924)." (Op. 10a-11a). Cf. *Economy Fuse & Mfg. Co.* v. *Raymond Concrete Pile Co.*, 111 F. 2d 875 (7th Cir. 1940). As part of Braniff's industrial family, and under the applicable substantive and procedural law, petitioners claim the right to likewise rely on those same implied provisions without being time-barred.

In cases where the New York courts seek to apply in that State the statute of limitations of a foreign State, they will apply the statute as a whole. "The test is whether the cause of action, if brought in the foreign jurisdiction, would be there barred." 2 *Carmody-Wait Cyclopedia of New York Practice* (1952) § 21. Cf. *Isenberg* v. *Ranier*, 145 App. Div. 256, 130 N. Y. Supp. 27, 28 (1st Dep't 1911). In litigation arising out of the same crash involved as herein, *King* v. *Douglas Aircraft Co.*, 159 So. 2d 108 (Fla. Dist. Ct. App. 1963), the wives and representatives of four Braniff Airways pilots, who were killed while riding as passengers on the Braniff flight, have already survived a Douglas motion for summary judgment. In the *King*

[6] Braniff brought such an action, to recover for the destruction of the aircraft, in 1960 in the District Court for the Southern District of New York (R. 33a) which has not yet been tried.

case the court found that "the implied warranty theory"[7] is applicable to the instant factual situation" (159 So. 2d 110), relying not only on Florida decisions, but also upon *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 191 N. E. 2d 81 (1963), discussed *supra*.

Petitioners do not contend that the Court of Appeals erred herein in looking " • • • to the law of the place of injury, here Florida, rather than to the law of the place of manufacture or of delivery to determine whether liability existed" (Op. 5a).[8] The error they point to is the Court of Appeals' determination (Op. 12a) that, "[i]n the absence of Florida decisions directly on point", the New York Court of Appeals would think that the Supreme Court of Florida would bar petitioners' joint action as not being founded upon an instrument of writing and therefore not within the five-year period to sue allowed under *Fla. Stat.* 95.11 (3).

The controlling decision, erroneously not applied by the Court of Appeals herein, is *Manning* v. *Serrano*, 97 So. 2d 688 (Fla. 1957). In that case the Supreme Court of Florida said:

> "There can be no doubt that where a transaction complained of has its origin in a contract and, at the

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[7] The effect of Douglas' disclaimer of any implied warranties (R. 31a-32a) and liability for consequential damages (Op. 11a) in the "Purchase Agreement" cannot be determined *contra* petitioners on this motion for summary judgment. The contract provides that it "shall be construed and performance thereof shall be determined according to the laws of the State of California, U. S. A." (Op. 4a). In California a similar disclaimer clause in a warranty agreement has recently been declared "void"; leaving present the implied warranties of merchantability and fitness for a particular purpose. *Vandermark* v. *Ford Motor Company*, 34 Cal. Rptr. 723 (Dist Ct. App. 1963).

[8] Petitioners have hitherto contended (R. 53a-56a) that California *substantive* law governs herein but now accept the applicability of Florida substantive law—each State being equally progressive in applying "strict liability" concepts.

same time, a duty is superimposed by or arises out of the circumstances of the transaction, the violation of which constitutes a tort, then the injured party has an election to sue in tort or for breach of contract." (97 So. 2d 689; citations omitted).

* * * *

"The general rule for the application of the statute of limitations in this situation is stated in the Restatement of Torts, Sec. 899, comment b, as follows:

'When this is so, the injured person, although barred by a statute from enforcing his contractual or quasi-contractual right, may not be barred from maintaining an action of tort, *or vice versa*, since the statutes commonly provide for a different period of limitation for tort actions and for those based upon a breach of contract or the right of restitution.'

See also 34 Am. Jur., Limitation of Actions, Sec. 104." (97 So. 2d 688; emphasis added.)

Recasting the above quote from the *Restatement of Torts* in terms of the "*vice versa*", the statement allows a suit premised upon a contract (i.e., warranty) theory, although the theory also smacks of "tort", if the suit is brought within the "contract" limitations period, even though otherwise barred by the "tort" limitations period. Such is the circumstance of petitioners herein.

The United States Supreme Court has held that a cause of action "* * * accrues and comes to an end when local law so declares." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 533 (1949).[9] In another Supreme

[9] The Circuit Court of Appeals herein failed to decide where, under the Florida substantive law, petitioners' cause of action would be deemed to have arisen. Florida would hold that the cause arose in Florida, the crash site. See *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954), quoting from *Erie v. Thompson*, 337 U. S. 163 (1949). Cf. *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P. 2d 897 (1961); *Puretex Lemon Juice, Inc. v. S. Riekes & Sons, Inc.*, 351 S. W. 2d 119 (Tex. Civ. App. 1961).

Court case, *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, 631 (1941), the Court granted certiorari "* * * to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case." In reversing the Circuit Court of Appeals, Mr. Justice Black wrote (312 U. S. 634):

> "But even before the decision in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. * * * It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations."

Again, the Circuit Court of Appeals herein has diverged from settled *Erie* doctrines in failing to consider the applicable state law. The result is a harsh one for petitioners and, moreover, an unsettling one in the area of accident litigation with multi-state contacts which finds its way into the Federal courts in-ever-increasing volume.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR E. DOW, JR.,
Counsel for Petitioners.

Dated: August 24, 1964.

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge*,
WATERMAN and FRIENDLY, *Circuit Judges*.

Appeal from an order of the District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, granting defendant's motion for summary judgment on the ground of the statute of limitations. Affirmed.

W. SHELBY COATES, JR. (Dow & Stonebridge, New York, N. Y.), *for Appellants*.

HAROLD V. McCOY (Reilly & Reilly, New York, N. Y.) (John M. Downing, of Counsel), *for Appellee*.

FRIENDLY, *Circuit Judge*:

Plaintiffs, members of the crew of a DC-7C sold by Douglas Aircraft Co. to Braniff Airways in 1957, were injured when the airplane crashed in Florida in the early morning of March 25, 1958, as the result of an engine failure shortly after taking off from Miami on a flight to South America. They brought this action against Douglas in the Southern District of New York on March 25, 1963, predicating federal jurisdiction on plaintiffs' citizenship in Texas and defendant's Delaware incorporation.[1] The complaint

[1] Although the point has not been raised, we note that the complaint is defective in failing to assert that Douglas' principal place of business is not Texas, 28 U. S. C. § 1332(c) and F. R. Civ. Proc. Form 2. However, we shall assume that Douglas' principal place of business is in California, and that the complaint could have been amended to allege this.

alleged that Douglas had "impliedly and expressly represented and warranted" that the aircraft sold by it to Braniff and the Curtiss-Wright engines installed therein "were of good and merchantable quality, free from defects, and fit for the purposes of commercial carriage for hire for which said aircraft and model engines were intended." Douglas moved for summary judgment "on the ground that the statute of limitations has expired"—more particularly the limitations statute of California, where the airplane was made and delivered, or of Florida, one or the other of which was considered to be made applicable by New York's "borrowing" statute, Civil Practice Act, § 13. Plaintiffs denied that the action was barred under the Florida statute of limitations, which they claimed to be the pertinent one. The judge ruled for Douglas.

Section 48-3 of the New York Civil Practice Act, in effect when the action was brought, allowed a six year period for "An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article"; § 49-6 allowed only three years for "An action to recover damages for . . . a personal injury, resulting from negligence." *Blessington v. McCrory Stores Corp.*, 305 N. Y. 140 (1953), held the six year statute applicable to an action by the administrator of a child against a store that had sold the mother a dangerously inflammable garment, on the ground that "the contract breached is not merely one to use due care, but is a separate (implied) contract of guaranty that the goods are fit for the purpose for which they are sold and bought." 305 N. Y. at 147. We shall follow the parties in assuming that the *Blessington* decision would also have covered an action against a manufacturer not in "privity" with the plaintiffs, although this would have produced what might appear to be the anomalous result that the non-negligent manufacturer within the

area of strict liability would be subjected to the six year statute whereas the negligent manufacturer outside that area would have the benefit of the shorter three year statute—a result seemingly inevitable under the New York statutes before their recent revision.[2] Contrast CPLR, §§ 213-2 and 214-5. Apart from the borrowing statute the action was thus timely even if Douglas was continuously subject to suit in New York.

New York's borrowing statute as it stood on March 25, 1963. Civil Practice Act, § 13, forbade the bringing of an action by a non-resident to enforce a cause of action "arising" outside New York "after the expiration of the time limited by the laws . . . of the state or country where the cause of action arose, for bringing an action upon the cause of action . . ."[3] If the New York courts would hold that plaintiffs' "cause of action arose" in California, where the contract of sale was executed and the airplane was manu-

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[2] The anomaly may have been only superficial since there may be more reason for a short statute of limitations in an action for negligence where pertinent evidence is likely to be lost than in an action based on strict liability. Also any anomaly was mitigated by the fact that under New York law actions for breach of warranty ruled by the six-year statute accrued on delivery, see *Kakargo* v. *Grange Silo Co.*, 11 App. Div. 2d 796, 204 N. Y. S. 2d 1010, appeal denied 11 App. Div. 2d 958, 207 N. Y. S. 2d 435 (2d Dept. 1960), whereas actions for negligence under the three-year statute accrued only on injury. If the New York rule as to the accrual of actions for breach of warranty were applicable, the instant action would be untimely under the six-year statute if the airplane was delivered before March 28, 1957. Since the defendant's affidavit alleged only delivery "in 1957," we need not consider whether, as regards its local statute of limitations, New York would here apply its own rule as to the accrual of an action for breach of warranty, or the more liberal rule of California, see *Aced* v. *Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P. 2d 897 (1961), or whatever the rule of Florida may be.

[3] This statute has been carried forward as CPLR § 202, but with "accruing" and "accrued" replacing "arising" and "arose."

factured and delivered,[4] that would end the matter since § 340(3) of the California Code of Civil Procedure establishes a one-year period of limitations for personal injury actions, and this has been held to apply whether the action sounds in contract or in tort. *Rubino* v. *Utah Canning Co.*, 123 Cal. App. 2d 18, —, 266 P. 2d 163, 168 (Dist. Ct. App. 1954). On the other hand the action was brought within the five years which Florida allows for "An action upon any contract, obligation or liability founded upon an instrument of writing not under seal," Fla. Stat. § 95.11(3), but not within Florida's three-year period for "an action upon a contract, obligation or liability not founded upon an instrument of writing . . .," § 95.11(5), or its four-year statute for "Any action for relief not specifically provided for in this chapter." § 95.11(4).[5]

Although the facts in *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 240 N. Y. S. 2d 592 (1963), might well have permitted a decision as to which state's substantive law would govern liability here, they did not produce one. The suit, brought by the administratrix of a passenger killed in New York against the manufacturers of a Lockheed airplane and of a Kollsman altimeter on a theory of warranty, came before the Court of Appeals on pleadings which did not allege the place of manufacture or delivery. The administratrix nevertheless relied on the law of California, which apparently does impose strict liability on an airplane manufacturer. *Hinton* v. *Republic Aviation Corp.*, 180 F. Supp. 31 (S. D. N. Y. 1959); *Garon* v. *Lockheed Aircraft Corp.*, 7 CCH Av. Cas. 17,418, 1962 U. S. Av. R. 130 (1961). Cf. *Peterson* v. *Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P. 2d 575 (1960); *Greenman* v. *Yuba Power Products, Inc.*, 59

[4] The contract provided that it "shall be construed and performance thereof shall be determined according to the laws of the State of California, U. S. A."

[5] We shall follow the parties in assuming, although the papers do not make this clear, that Douglas was suable in Florida ever since the date of the accident. Otherwise, under Fla. Stat. § 95.07, the running of the statute of limitations would have been tolled.

Cal. 2d 57, 377 P. 2d 897 (1962). The Special Term had dismissed the complaint, 23 Misc. 2d 215, 199 N. Y. S. 2d 134 (Sup. Ct. 1960), on the basis of New York law which it held to be applicable on the authority of *Poplar* v. *Bourjois, Inc.*, 298 N. Y. 62, 80 N. E. 2d 334 (1948) and which, on its view, did not impose strict liability. The Appellate Division affirmed. 12 A. D. 2d 906, 214 N. Y. S. 2d 640 (1961). The majority of the Court of Appeals, taking a different view of New York substantive law on the basis of opinions it had rendered subsequent to the decisions below, notably *Randy Knitwear, Inc.* v. *American Cyanamid Co.*, 11 N. Y. 2d 5, 226 N. Y. S. 2d 363 (1962), said that "it really makes no difference whether New York or California law be applied, since in this respect both States use the same rules." 12 N. Y. 2d at 436, 240 N. Y. S. 2d at 594. However, the majority evidently looked to New York law in approving dismissal of the complaint as to Kollsman, the manufacturer of the allegedly defective altimeter, the places of manufacture or delivery of which were not alleged, and the three dissenters did the same in urging that the complaint against Lockheed should be dismissed without suggesting that plaintiff ought be given an opportunity to amend so as to plead manufacture and delivery in California.

Combining these radiations from the *Goldberg* opinions with the *Poplar* decision and Chief Judge Desmond's statement in *Goldberg* that "strict tort liability" would be "a more accurate phrase" to describe the liability being imposed, 12 N. Y. 2d at 437, 240 N. Y. S. 2d at 595, we think New York would look to the law of the place of injury, here Florida, rather than to the law of the place of manufacture or of delivery to determine whether liability existed. This prediction is buttressed by what our own view would be apart from these helpful intimations. The interest protected by the imposition of strict liability on a manufacturer is, as Dean Pound pointed out, the interest in maintaining "the general security." Introduction to the Philosophy of

Law 87 (1953 ed.). An accident caused by a defective product threatens the "general security" of the state where the injury occurs rather than of the state of delivery, which is often determined by tax or other considerations wholly extraneous to the instant problem, or even of the state of manufacture. In the typical cases of strict products liability—the trichinous pork, the inflammable garment, the exploding bottle, the defective steering gear, or the noxious cosmetic—the victim will generally be resident in the state where injured. While this will less frequently be true of airplane crashes, that state is likely to incur the burden of hospitalization and care of residents and non-residents alike. Moreover, one could hardly support application of a different choice of law rule for airplanes than for automobiles, and it would seem quite irrational that the victim's recovery on a theory of strict liability should depend upon whether or not the state where the plane was manufactured had chosen so to provide with respect to accidents as to which it had primary concern. Extra-state manufacturers are not entitled to have their goods enter a state on easier terms as to liability than the state establishes generally; they are as able as the intra-state manufacturer to provide for their own protection by insurance or self-insurance. Even more clearly if a state has decided in general that persons injured within its borders by a particular kind of defective chattel should not be allowed to recover against the manufacturer except for negligence, there would be little reason to accord a greater degree of protection because the chattel causing the injury was made in another state which has shown a broader concern for the general welfare of its citizens by imposing strict liability.

Although we travel thus far down the road with appellants, we cannot accept their conclusion that this necessarily means that New York would consider their cause of action to be one "arising" in Florida for the purpose of making Florida's limitation period the controlling one under § 13. As a matter of the ordinary meaning of language it

seems equally possible to say that the cause of action "arose" in California where defendant's allegedly wrongful act was done or in Florida where plaintiffs were injured by it—and this even though Florida be regarded as furnishing the normative rule. In predicting which choice the New York Court of Appeals would make, we must give weight to the purpose of the borrowing statute. It has been said that such additions to the statute of limitations "were necessitated by the rule [e.g., New York Civil Practice Act, § 19] that the period is interrupted by absence of the defendant from the forum whether the cause of action arose in the forum or in a foreign jurisdiction against a nonresident defendant. In the absence of a borrowing statute, this rule would permit actions which have long since been barred by the *lex loci* and by the statutes of the state where the defendant resided and which would have been barred by the forum had the defendant resided there since the cause of action arose." Note, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1262-63 (1950). See also Ester, Borrowing Statutes of Limitations and Conflict of Laws, 15 U. Florida L. Rev. 33, 40-44 (1962).

New York's response to this need has had a long and tortuous history. The initial effort was § 390 of the Code of Remedial Justice (later designated as the Code of Civil Procedure), Laws, 1876, c. 448. This provided, with exceptions not here material, that an action could not be brought in New York against a non-resident "after the expiration of the time, limited, by the laws of his residence, for bringing a like action. . . ." In 1902 the Legislature supplemented this with § 390a, Laws, c. 193, which ultimately became § 13 of the Civil Practice Act. Since non-residents were already quite well taken care of by § 390, the initial purpose of § 390a must have been to protect residents from suits in New York that would have been barred in a state having a closer connection with the claim, as well as to give additional protection to non-residents as to claims "arising" in a state which was neither New York nor that

of their residence, including the case, presumably a rare one, where the statute of the state of their residence had been tolled but the statute of the third state had not been. For reasons no longer understood, see *Kirsch* v. *Lubin*, 131 Misc. 700, 227 N. Y. S. 94 (1927), aff'd, 223 App. Div. 826, 228 N. Y. S. 825 (1928), aff'd, 248 N. Y. 645, 162 N. E. 559 (1928); New York Law Revision Commission, Report, pp. 178-83 (1943), the Legislature later added a proviso to § 390, "that if the limitation of the time fixed by the laws of his [the non-resident's] residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply." Laws, 1916, c. 536; in this form § 390 became § 55 of the Civil Practice Act. Since the addition of the 1916 proviso largely frustrated the original purpose, the 1943 Legislature, acting on the cited report of the Law Revision Commission, repealed old § 55 and enacted an essentially meaningless one reading as follows:

> "§ 55. Action against nonresident; same limitation as against resident. Except as provided in section thirteen of this act an action upon any cause of action may be brought in a court of this state within the time limited therefor by the laws of this state, and may not be brought thereafter, and the time limited for bringing a like action by the laws of the place of residence of the person against whom the cause of action arose or by the laws of the place where the cause of action arose, shall not apply." Laws, 1943, c. 516.

The new CPLR omits this useless provision.

However difficult it may be to follow these meanderings, New York's policy for nearly a century has been to protect a non-resident defendant against an action in New York, which was timely because of the tolling provision of § 19 of the Civil Practice Act, but had become barred elsewhere. From 1877 to 1902 this office was performed by

§ 390 of the Code of Civil Procedure, from 1902 to 1916 by a combination of §§ 390 and 390a, and since 1916 solely by the latter, subsequently § 13 of the Civil Practice Act and now § 202 of the CPLR. This being the principal evil with which the New York Legislature sought to deal, a court required to choose between two linguistically permissible decisions as to where a cause of action "arose" ought to lean to the reading more likely to achieve the underlying policy against prolonging the period of limitations because of the defendant's absence from a jurisdiction where there was no reason to expect him to be present. The New York courts have shown their awareness of these considerations by interpreting § 13 to include a borrowing statute of a state where the cause of action "arose" barring the prosecution of a claim if an action is barred by the state of the defendant's residence. *Holmes* v. *Hengen*, 41 Misc. 521, 85 N. Y. Supp. 35 (Sup. Ct. 1903), aff'd mem. 94 App. Div. 619, 88 N. Y. Supp. 1104 (1st Dep't, 1904); cf. *Ross* v. *Graham*, 122 Misc. 574, 203 N. Y. Supp. 390 (Sup. Ct. 1924). Contrast *Hobbs* v. *Firestone Tire & Rubber Co.*, 195 F. Supp. 56 (N. D. Ind. 1961). In personal injury actions against a manufacturer, the latter's amenability to suit in the place of injury would be fortuitous, at least in the absence of a considerable extension of "long-arm" statutes, compare *Young* v. *Hicks*, 250 F. 2d 80 (8 Cir. 1957), and the usual tolling statute in that state might indefinitely prolong the limitations period. On the other hand, the manufacturer would always be suable in the state of manufacture and generally in that of delivery, the two latter being identical in the instant case. As indicated above, we perceive no obstacle to predicting that the New York Court of Appeals would consider a cause of action as "arising" for the purposes of the borrowing statute in a state different from the one whose substantive law would determine liability; that Court's recent opinion in *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743 (1963), stated that decision of each choice of law

question "must turn . . . on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented." Sharing Professor Ehrenzweig's view that the place-of-accrual test is "ambiguous" if not "entirely unworkable," Conflict of Laws 430 (1962), and despite general statements that a tort action inevitably "arises" where the last act necessary to establish liability occurred, we predict that New York would hold that plaintiffs' cause of action here "arose" in California, whose one year statute would be a bar.[6]

Since we cannot be wholly confident as to the accuracy of that prediction, we think it well also to examine the consequences if New York would in fact consider the issue governed by Florida's statutes of limitations. On that view; see fn. 5, plaintiffs acknowledge they could prevail only if their action is "upon any contract, obligation or liability founded upon an instrument of writing not under seal," for which § 95.11(3) permits an action to be brought "within five years"[7] rather than "upon a contract, obligation or liability not founded upon an instrument of writing," which carries a three year period, or in tort, covered by the four year period "for relief not specifically provided for in this chapter." *Warner* v. *Ware*, 136 Fla. 466, 182 So. 605 (1938); *Manning* v. *Serrano*, 97 So. 2d 688 (Fla. 1957). An action by Braniff against Douglas under the purchase contract would come within § 95.11(3) even if Braniff relied on provisions that were implied rather

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[6] We have not thought it necessary to consider the possibility that New York would bar the action if it was barred either in Florida or in California, on the theory that conduct by the manufacturer and injury to the plaintiffs were both indispensable to the cause of action, so that the latter would "arise" in both states. Compare *Partridge* v. *Palmer*, 201 Minn. 387, 277 N. W. 18 (1937) and *Osgood* v. *Artt*, 10 Fed. 305 (N. D. Ill. 1882).

[7] If § 95.11(3) were applicable, the action would be timely although the accident occurred early on March 25, 1958, and the suit was not begun until March 25, 1963. *McMillen* v. *Hamilton*, 48 So. 2d 462 (Fla. 1950).

than express. *McGill* v. *Cockrell*, 88 Fla. 54, 101 So. 199, 201 (1924). Plaintiffs would proceed from that premise on the basis that the Florida decisions on products liability speak, as do many others, in terms of "implied warranty." *Blanton* v. *Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313 (1944); *Matthews* v. *Laculite Co.*, 88 So. 2d 299 (Fla. 1956); *Continental Copper and Steel Industries, Inc.* v. *E. C. "Red" Cornelius, Inc.* 104 So. 2d 40 (Fla. Dist. Ct. App., 1958); *Carter* v. *Hector Supply Co.*, 128 So. 2d 390 (Fla. 1961); *Smith* v. *Platt Motors, Inc.*, 137 So. 2d 239 (Fla. Dist. Ct. App., 1962). But it is simply confusing to consider an obligation which the law imposes irrespective of the intention of the parties or even in direct contravention of their expressions as in the same category as a contractual warranty, express or fairly implied.[*] Douglas specifically confined its warranties to three named in the purchase contract and limited its liability for breach of those three to correcting them if defects occurred within specified periods, disclaiming any liability for consequential damages. The warranties cannot therefore be construed as impliedly extending to the crew, as part of Braniff's "industrial family" or on a third party beneficiary theory, see Harper & James, The Law of Torts, 1958-90 (1956), and any liability which the plaintiffs can assert on these pleadings would be in spite of, rather than under, the terms of the contract. The nature of a manufacturer's liability to third parties has been recently stated by the Supreme Court of Florida to be "the undertaking or agreement, attributed by law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes." *Green* v. *American Tobacco*

[*] "The insistence on using contract terminology and the lag in recognizing a tort liability to be what it is reminds of Sir Henry Maine's comment that fictions are 'the greatest of obstacles to symmetrical classification' . . . There is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place." Ancient Law, 32.

Co., 154 So. 2d 169, 171 (Fla. 1963). In the absence of Florida decisions directly on point, we think the New York Court of Appeals would think that the Supreme Court of Florida would think that such a liability would be either "upon a contract, obligation or liability not founded upon an instrument of writing" or, still more reasonably, in tort. See Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1124-34 (1960); ALI, Restatement 2d, Torts § 402A, comment g (Tent. Draft No. 7, 1962); *Goldberg* v. *Kollsman Instrument Corp.*, *supra*, 12 N. Y. 2d at 436-37, 240 N. Y. S. 2d at 595.[9]

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result we have reached.

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[9] On this view it is unnecessary for us to consider whether if the New York Court of Appeals would think the cause of action arose in Florida it would not also feel bound to inquire whether Florida would take the same view under its similar borrowing statute. Compare *Holmes* v. *Hengen*, *supra*. If, contrary to our belief, the Court of Appeals would think the Supreme Court of Florida would think the action was "upon any contract, obligation or liability founded upon an instrument of writing," it might also think the Florida Court would think such a cause of action on the contract "arose" in California and would be barred by the Florida borrowing statute.

APPENDIX B

Judgment of the United States Circuit Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of April one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

THOMAS D. GEORGE, JOHN C. WINTHROP and CHARLES F. FINK,
Plaintiffs-Appellants,

v.

DOUGLAS AIRCRAFT CO., INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

United States ~~District~~ Court of Appeals
Second Circuit
Filed April 28, 1964
A. DANIEL FUSARO, Clerk